Cambro Manufacturing Company *and* United Electrical, Radio, and Machine Workers of America. Case 21–CA–27795

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The question presented here is whether the judge correctly concluded that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by discharging 11 employees who engaged in an in-plant work stoppage.[1] The judge rejected the Respondent's defense that it legitimately relied on the employees' unprotected failure to comply with a management directive to return to work or to leave the Employer's property.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

For the reasons set forth below, we reverse the judge and find that the Respondent's discharge action was lawful.

The Respondent has over 400 production and maintenance employees on three work shifts. No labor organization represents these employees. A personnel handbook details the Respondent's ''Open Door Policy'' for the presentation and discussion of employee grievances.

This policy states in relevant part:

> Employees are encouraged to see their immediate supervisor with questions relating to the job or problems they may be experiencing. The supervisor's assistance may involve getting the aid of other persons.
>
> If, after meeting with the immediate supervisor, an employee feels the question or problem is not or will not be resolved, that employee may request a meeting with the next higher authority in the chain of command up to and including the company president.
>
> If an employee believes the immediate supervisor is the source of the problem and he/she feels uncomfortable about approaching the supervisor, the employee may request a meeting with the supervisor who is the next higher authority in the chain of command.

At some point in October 1991,[2] a group of second-shift employees successfully resolved certain complaints after meeting directly with General Manager Steve Thompson. On Thursday, October 25, 1991, a group of 30 to 35 third-shift employees had a similar grievance meeting with Thompson after the 7:30 a.m. end of their shift. Principal complaints concerned the treatment of employees by Supervisor Victor Lopez and the selection of newly hired employee Gabriel Sepulveda for training as a leadperson. Thompson told the employees that he would investigate and respond to their complaints within 2 or 3 days. When the third shift began work at 11:30 p.m. on Monday, October 29, the third working day since the meeting, Thompson had not yet conveyed any response.

Prior to the third shift's first workbreak, employee Jose Juventino Pulido was summoned to a meeting in the office of Supervisor Ron Meredith, who was Supervisor Lopez' immediate superior. Meredith, Lopez, and Second-Shift Supervisor Jose Redondo were in the office with Pulido. The Respondent's officials inquired about the reasons for Pulido's opposition to the selection of Sepulveda for leadperson training. After the meeting, according to the testimony of other third-shift employees,[3] Pulido alleged that the supervisors had identified him as an employee leader, told him not to get the employees excited, and said they would do something to him if he continued getting people rattled.[4]

Employees discussed the Pulido meeting and prior grievances during the third-shift break at 1:30 a.m. At the end of the break, several employees met with Lopez in the production area. They raised numerous problems, including Sepulveda's selection for leadperson training. Lopez then determined to meet with employees one at a time to discuss these problems. He held three such meetings.

Meanwhile, between 2:30 and 3 a.m., the 11 alleged discriminatees and employee Antonio Lopez ceased working. They met with Supervisor Lopez, who directed them to return to work. The employees declined to do so until they had talked to Plant Manager Thompson or the Respondent's owner. Thompson lived 25 miles from the plant. He normally worked in the plant only during the period from 7 a.m. to 7 p.m. The Respondent's owner was an elderly, infirm man who did not drive. The employees knew that neither official would usually appear at the plant during their shift. Supervisor Lopez told the employees again to go back to work, explaining that Thompson or the owner would show up early in the morning so that a meeting could be held at that time to discuss the employees' problems. Lopez also explicitly told employees that they

[1] On November 26, 1991, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief.

[2] All subsequent dates are in 1991, unless otherwise stated.

[3] Pulido himself did not testify.

[4] There is no allegation that these supervisory remarks were illegal.

should clock out if they did not intend to return to work. At this point, Lopez left the production area. The 12 employees continued their work stoppage. Both before and after the 3:30 a.m. lunchbreak, these protesters remained in the employee dining room or in the adjacent working corridor separating that room from Thompson's office.

At approximately 4 to 4:30 a.m., Supervisor Lopez telephoned Thompson with news of the work stoppage. Pursuant to Thompson's instructions, Lopez again told the employees to go back to work or to clock out and return at 7:30 a.m. for a meeting with Thompson. Employee Antonio Lopez did return to work at this time. The other 11 employees remained in and around the employee dining room.

Thompson arrived at the plant about 6 a.m. He met with Supervisor Lopez first, then with the 11 employees who had ceased work. The employees told him that he had not responded to their problems within 2 or 3 days as promised. Thompson concluded this meeting by announcing that the employees were suspended. He soon gave each individual a notice of suspension ''for failure to follow instructions pending an investigation.'' Thompson told them either to call or return to Respondent's facility that afternoon. The suspended employees persisted in remaining within the plant until after Thompson called the police. They then left, ostensibly because one member of their group felt ill.

During the morning, Thompson met with management officials and legal counsel. A decision was made to terminate the 11 employees. That afternoon, each suspended employee received a personnel notice of termination for insubordination because of ''refusal to return to work or leave company property.'' In his testimony, Thompson explained that

> [w]e terminated the employees because they—they stopped their work and they stopped their work because they were unhappy with one of our leads. They—We found ourselves in the middle of a grievance procedure, it wasn't at the end or at the beginning, it was in process. They would not go back to work so that we could continue on the grievance procedure, they wouldn't leave the plant and they would not clock out and that is the reason that we terminated them.[5]

Thompson also specifically testified that he would not have fired the employees if they had either returned to work or had clocked out and returned for a meeting at 7:30 a.m.

The judge found that the employees were engaged in the statutorily protected activity of protesting various aspects of their working conditions. He further found that the employees did not forfeit the Act's protection as a consequence of their choice of an in-plant work stoppage as the means of protest. The judge characterized this action as reasonable, nondisruptive, limited, and in accord with the Respondent's ''Open Door Policy.'' Furthermore, even assuming arguendo that the work stoppage became unprotected at some point, the judge rejected the Respondent's claim that its actual motivation in discharging the alleged discriminatees was related to the in-plant means of protest. Accordingly, he concluded that the Respondent violated Section 8(a)(1) when it discharged the 11 employees.

We agree with the judge that the third-shift employees had a Section 7 right to protest the failure to consider seniority in selecting Sepulveda for leadperson training. We conclude, however, that the in-plant work stoppage reached a point at which it was no longer a protected means of protest. We further disagree that there is any evidentiary basis for finding that the Respondent discharged the alleged discriminatees for any reason other than their failure to abide by the Respondent's instructions either to return to work *or* to clock out, leave the plant, and return later for a meeting with Plant Manager Thompson.

The Seventh Circuit has recently summarized the legal framework for analyzing the extent to which in-plant work stoppages are protected.

> The concerted activity at issue here (i.e., an on-the-job work stoppage) is a form of economic pressure entitled to protection under Sec. 7 of the Act. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962) (work stoppage to protest lack of heat during harsh winter protected activity under Sec. 7). Not every work stoppage is protected activity, however; at some point, an employer is entitled to assert its private property rights and demand its premises back. The line between a protected work stoppage and an illegal trespass is not clear-cut, and varies from case to case depending on the nature and strength of the competing interests at stake. See *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).
>
> Drawing that line requires courts to balance ''whether the *means* utilized by the employee in protesting, when balanced against the employer's property rights, are entitled to the protection of the Act.'' *Peck, Inc.*, 226 NLRB 1174, 1175 (1976) (Member Penello, concurring); compare *Golay & Co. v. NLRB*, 371 F.2d 259, 262 (7th Cir. 1966) (work stoppage protected because employer refused to discuss the matter and hastily discharged the workers without any warning to leave the property), cert. denied 387 U.S. 944

[5] Tr. 346. In light of this uncontroverted testimony, the judge clearly erred in stating that Thompson did not affirmatively identify the actual reason or reasons for the Respondent's termination decision.

(1967); *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1359 (8th Cir. 1989) (peaceful work stoppage on the shop floor, lasting several hours, protected, concerted activity); *NLRB v. Pepsi-Cola Bottling Co.*, 449 F.2d 824, 829–830 (5th Cir. 1971) (peaceful, unobtrusive work stoppage protected activity and employer's order to leave plant hindered ability to present grievances), cert. denied 407 U.S. 910 (1972) with *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252, 255 (1939) (employees who seized and retained possession of employer's plant for several days engaged in illegal trespass); *Advance Indus. Div.-Overhead Door Corp. v. NLRB*, 540 F.2d 878, 885 (7th Cir. 1976) (workers who neglected ordinary grievance procedure and refused to leave premises after shift ended engaged in illegal trespass); *Cone Mills Corp. v. NLRB*, 413 F.2d 445 (4th Cir. 1969) (workers who continued their in-plant work stoppage in spite of established grievance procedures and a hearing from management engaged in illegal trespass); *Peck, Inc.*, 236 NLRB at 1180 (workers who occupied the employee lunchroom after shift ended engaged in illegal trespass).[6]

The in-plant work stoppage here was peaceful, focused on several specific job-related complaints, and caused little disruption of production by those who continued to work. In such circumstances, the employees were entitled to persist in their in-plant protest for a reasonable period of time. Indeed, the Respondent's officials permitted them to do so. The situation, however, reached a point at which the Respondent was entitled to reclaim the use of its entire premises.

In our view, this point arrived after Supervisor Lopez returned from his telephone conversation with Plant Manager Thompson and directed the protesters for a second time to return to work or to clock out, leave the premises, and return for the desired meeting with Thompson at 7:30 a.m. This directive did not impair the employees' protected right to present their grievances. They had already discussed their problems among themselves and with Supervisor Lopez. They had demanded, and were lawfully denied, an unprecedented predawn meeting with the Respondent's plant manager or owner. They were assured the opportunity, in full accord with the Respondent's open door policy, to meet in just a few hours with Thompson for further discussion of their complaints. They had met with him in the very same manner and at the very same time on October 25.[7]

Contrary to our dissenting colleague, we find *NLRB v. Pepsi-Cola Bottling Co. of Miami*, 449 F.2d 824 (5th Cir. 1971), and *Roseville Dodge v. NLRB*, 882 F.2d 1355 (8th Cir. 1989), to be entirely consistent with our analysis here. In each of those cases, the court emphasized the absence of an established grievance procedure in finding that an employer unduly restricted the protected right of employees, engaged in a peaceable in-plant strike, to present their grievances. Here, Supervisor Lopez assured in-plant striking employees the opportunity to meet with the Respondent's president in accord with past practice under the open-door policy. Lopez' subsequent direction that employees return to work or leave the plant and return later for the meeting served the Respondent's immediate interest in maintaining its established grievance procedure and placed no undue restriction on those employees' right to present grievances within a few hours pursuant to that procedure.

We find that the employees' failure to return to work or to leave the plant after Lopez' second directive resulted in forfeiture of the Act's protection. Further in-plant refusals to work served no immediate protected employee interests and unduly interfered with the employer's right to control the use of its premises. Accordingly, the Respondent could lawfully discharge the 11 employees for continuing their in-plant work stoppage.

As indicated, however, the judge found that the employees' failure to return to work or to leave the premises was not the real reason for their discharge. Although he did not expressly say so, the judge apparently believed that the Respondent actually sought to retaliate generally against the protected expression of grievances or against the protected refusal to work, without real regard to whether the refusal occurred on

[6] *Molon Motor & Coil Corp. v. NLRB*, 965 F.2d 523 (7th Cir. 1992).

[7] As previously noted, Thompson told the third-shift employees at this Thursday morning meeting (Oct. 25) that he would respond to their grievances in 2 to 3 days. Our dissenting colleague asserts that by Tuesday, October 30, these employees had waited 5 days for a response from Thompson, and that Thompson's response was overdue. The judge found that the employees reasonably believed that Thompson was referring to 2 to 3 calendar days. We disagree with this finding. After Thompson made his promise, the third-shift employees worked from 11:30 p.m. to 7:30 a.m. on Thursday-Friday, Sunday-Monday, and Monday-Tuesday. They did not work on Friday-Saturday or Saturday-Sunday, the second and third calendar days after the Thursday meeting. Furthermore, Thompson did not regularly arrive for work at the plant until 7 a.m. on Monday. Under these circumstances, there would have been no reason whatsoever for the third-shift employees to believe that Thompson planned to respond to their grievances on days when neither they nor he were scheduled to work. Instead, they reasonably should have understood that Thompson was referring to working days. The third-shift work stoppage involved here occurred during the third workday for that shift after the Thursday meeting. Consistent with his earlier statement at that meeting, Thompson agreed to meet with employees on Tuesday morning, October 30, at the end of this shift. Further, even if employees reasonably believed that the meeting should have been held at least on Monday at 7:30 a.m., that would not justify continuation of an in-plant work stoppage on Tuesday morning, after Thompson's offer on Tuesday to meet later that morning.

or off the Respondent's property. We find no evidentiary basis for such a belief.

Contrary to the judge, the record overwhelmingly supports the Respondent's claim that it discharged employees only for refusing to leave the plant if they chose to exercise their protected right to refuse to work in support of their grievances. In this regard, as previously noted, the judge completely overlooked Thompson's affirmative testimony that he discharged the 11 alleged discriminatees because ''[t]hey wouldn't go back to work so that we could continue on the grievance procedure, they wouldn't leave the plant and they wouldn't clock out and that's the reason that we terminated them.'' This testimony is fully consistent with the stated reason for discharge in the personnel notice given to each employee on October 30. Furthermore, the notion that the Respondent sought to punish employees for their message or merely for refusing to work, rather than for their prolonged in-plant protest, is rebutted by the Respondent's failure to take any disciplinary action against any of the other third-shift employees who voiced complaints. Most notable among this group of unpunished protestants was employee Antonio Lopez, who *did* abandon the work stoppage and return to work after Supervisor Lopez' second directive.

In sum, we find that the 11 employees who continued their in-plant work stoppage for an unreasonable time after being told to return to work or to continue their protest off the Respondent's premises were engaged in unprotected activity. We further find that the Respondent discharged these employees because they engaged in such unprotected activity. We therefore conclude that the Respondent has not violated the Act, and we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I find that the Respondent unlawfully discharged 11 employees for engaging in a protected in-plant work stoppage.

In my view, the strike here is analogous to that in *NLRB v. Pepsi-Cola Bottling Co. of Miami*.[1] There, the court affirmed the Board's finding that the in-plant strikers had been engaged in protected activity and had been unlawfully discharged. The employees, who were protesting the employer's refusal to reinstate some earlier discharged employees, sat down in the plant and refused the employer's demand that they either return to work or leave the plant, the same demand made to and refused by the employees in question here. Like the instant employees, the employees in *Pepsi-Cola* made no attempt to seize the plant or machinery, nor did they engage in violence, make threats of violence, or damage plant equipment. Nevertheless, they were discharged for engaging in what the employer characterized as an ''illegal sitdown strike.'' In finding the discharges to be unlawful, the court found no evidence that the employees had claimed to hold the plant premises in defiance of the employer's right of possession, or that they had interfered with the work performance of the nonstrikers. The court specifically rejected the employer's argument—also propounded here—that the strikers had become illegal trespassers, beyond the scope of the Act's protection, when they refused to comply with the employer's demand that they either return to work or leave the plant. The court held that an employer cannot convert a protected in-plant work stoppage into an unprotected trespass by the simple expedient of ordering his employees from the plant, where such an order serves no immediate employer interest and unduly restricts the employees right to present grievances to their employer.

Similarly, in *Roseville Dodge v. NLRB*,[2] the court affirmed the Board's finding that employees who had been engaging in a protected in-plant work stoppage did not lose their protection when they remained in the plant for a couple of hours after two of their fellow strikers had obeyed the employer's order to leave the plant. The court held that not every strike in which strikers remain on the premises amounts to an unlawful deprivation of an employer's rights. Employees may remain on an employer's property ''in a sincere effort to meet with management concerning a protest over wages without being deprived of the protection of the Act.''

The court found in *Roseville* that—as here—there was no evidence suggesting that the employees seized any portion of the employer's property, engaged in acts of violence, caused any property damage, or interfered with other employees. The court found that the employees' activities remained protected because they waited peacefully on the employer's premises to present their complaints and because their conduct did not amount to a significant occupation of the premises. To hold otherwise would render the protection set forth in Section 7 of the Act meaningless.

Applying the principle that an employer cannot convert a protected in-plant work stoppage into an unprotected trespass simply by ordering the strikers to leave the plant, unless the order to leave serves an immediate employer interest and does not unduly restrict the employees in their right to present grievances to their employer, the judge here found that the record failed to establish the existence of any such immediate employer interest in evicting the strikers. He found no evidence that the strikers ever claimed to hold the

[1] 449 F.2d 824, 829 (5th Cir. 1971), enfg. 186 NLRB 477 (1970).

[2] 882 F.2d 1355 (8th Cir. 1989), enfg. sub nom. *City Dodge Center*, 289 NLRB 194 (1988).

plant in defiance of the Respondent's right of possession; no evidence that the strikers were interfering in any way with the ongoing work of the employees who had chosen not to join in the strike; no evidence that the presence of the relatively few strikers in the dining room and immediately surrounding area interfered in any way with employee access to the dining room, or the performance of work in the adjacent storage area; no evidence of property damage; no evidence of threats or acts of violence; and no evidence of loss of production, other than the work that the strikers themselves did not do while they were engaged in their work stoppage.

The judge further found that the length of the in-plant work stoppage (about 4 hours) was not per se excessive, and that it did not, without more, strip the strikers of the Act's protection. He noted that, at least prior to their ultimately being suspended by General Manager Thompson, the employees had never given any indication that they intended to remain in the Respondent's dining room for an indefinite or prolonged time. On the contrary, they told Supervisor Lopez that they intended to remain in the dining room only until the general manager or owner could get to the plant to meet with them and hear their grievances. The judge found no evidence that would support even an inference that the strikers would have remained on strike following such a meeting with higher management. Based on all of these considerations, the judge found that the Respondent had the ability effectively to bring the work stoppage to an end at any time, by General Manager Thompson or the Respondent's owner coming to the plant to meet with the strikers. Thus, the judge found that the Respondent's order to the strikers to leave the plant had not been shown to have served an immediate Respondent interest, and the strikers were therefore not stripped of the Act's protection for disobeying it.

The judge further found that the Respondent's order to leave the plant unduly restricted the strikers' right to present their grievances. He found that the employees' request that a management official come to the plant during the third shift was ''not so unreasonable as it might appear at first blush,'' under the unusual circumstances existing at that time, i.e., an in-plant work stoppage on the third shift at the Respondent's around-the-clock plant. The judge held that for the Respondent to proceed on the simple premise, without more, that the third-shift employees should be the ones to be inconvenienced in such a circumstance is an allocation of burden between employee and employer that is not necessarily required of employees to secure the Act's protection. He noted that the third-shift employees had already been waiting fruitlessly for a couple of days for General Manager Thompson's overdue promised responses to the grievances they voiced to him 5 days earlier in compliance with the Respondent's published grievance procedures. As the judge stated, by the time of the events leading up to the early morning work stoppage, from the employees' perspective, the Respondent appeared to be failing to comply with its own grievance procedure. Accordingly, the Respondent's order to the strikers to leave the plant, without being allowed to wait for Thompson to arrive, and to instead return to the plant later in the day to meet with him during their personal time off was clearly an undue restriction on the right of the strikers to continue to present their grievances to higher management.

My colleagues acknowledge that at its inception, the in-plant work stoppage was protected activity. The work stoppage was peaceful and did not disrupt production by those who continued to work. My colleagues also acknowledge that the employees were entitled to persist in their in-plant work stoppage for a reasonable period of time. They find, however, that such ''reasonable time'' expired, and that the continued in-plant work stoppage lost its protection after Supervisor Lopez directed the employees for a second time to return to work or leave the plant. They hold that the Respondent's order that the employees return to work or leave the plant actually did not impair their protected right to present their grievances, because they had already discussed their problems with Supervisor Lopez;[3] the Respondent's denial of their request that Thompson or the owner meet with them right away was not unlawful; and they were promised that they would be allowed to talk to Thompson later that morning, after their shift was over, just like they had been allowed to do 5 days earlier. My colleagues conclude that by failing to obey Lopez' second demand that they return to work or leave the plant, the strikers forfeited the protection of the Act and subjected themselves to being fired, because further in-plant refusals to work would serve no immediate protected employee interest and would unduly interfere with the Respondent's right to control the use of its premises. However, at the time Lopez told the employees for the second time to return to work or leave the plant—the point at which my colleagues find that the in-plant work stoppage lost the protection of the Act—the in-plant work stoppage had been going on continuously for about 4 hours, completely unchanged in its undisputedly peaceful, nondisruptive character. My colleagues point to nothing in the record that would support a finding that there was an immediate Respondent interest that could be served by the strikers' eviction at that point.

[3] Here my colleagues have lost sight of the fact that one of the employees' biggest professed problems was Supervisor Lopez him.

Based on the foregoing, I would affirm the judge's finding that the Respondent unlawfully discharged the employees for their continued participation in a protected in-plant work stoppage.

Salvador Sanders, Esq., for the General Counsel.
Kenneth E. Ristau Jr. and *Geniene T. Henry*, with him on brief *(Gibson, Dunn & Crutcher)*, of Newport Beach, California, appearing for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Los Angeles, California, on March 20 and 21, 1991. On December 21, 1990,[1] the Acting Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on November 6, alleging violations of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 151, et seq. (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,[2] on the briefs that were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Cambro Manufacturing Company (Respondent) has been a California corporation engaged in the manufacture and sale of plastic containers, with a plant located at 7601 Clay Avenue, Huntington Beach, California. In the normal course and conduct of those business operations, Respondent annually sells and ships goods valued in excess of $50,000 directly to customers located outside the State of California. Therefore, I conclude, as admitted by the answer to complaint, that at all times material Respondent has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

At its Huntington Beach facility Respondent employs over 400 production and manufacturing employees, working on three shifts. The issues in this proceeding arise from events that occurred on October 30 during the third shift, for which the workweek begins at 11:30 p.m. on Sundays and concludes at 7:30 on Friday mornings.

Following conclusion of their shift on Thursday morning, October 25, a group of third-shift employees presented a series of complaints about various working conditions to General Manager Steve Thompson, an admitted statutory supervisor and agent of Respondent. As described in greater detail in subsection II,B, infra, Thompson promised to report back to the employees regarding these matters. But he did not do so before commencement of the shift on October 29 and 10 third-shift rotomold department assemblers—Reyes Venegas, Rogelio Rodriguez, Luis Martin Gomez, Jose Juventino Pulido, Ofelia Romero, Alida Nunez, Francisco Lemus, Rafael Ramirez, Ramon Ventura, and Hugo Torres Blanco—and foamer's helper Bernardo Hernandez Gonzalez stopped work during the early morning of October 30 and demanded another meeting with Thompson or a meeting with Respondent's owner, neither of whom were then present at Respondent's facility. Although instructed to either return to work or to clock out and leave the facility, the employees refused to follow both alternative instructions. Instead, they chose to remain in the facility's dining room and in the area outside of it, awaiting the appearance of either Thompson or the owner. When Thompson did arrive, he met with the 11 employees and suspended them. During the afternoon of October 30 each of those employees was notified that he or she had been fired.

The General Counsel alleges that those terminations were motivated by the employees' protected concerted activity of protesting working conditions and, consequently, violated Section 8(a)(1) of the Act. Conversely, Respondent advances principally two arguments in opposition to that allegation. However, as discussed in subsection II,C, infra, those arguments lack evidentiary support and legal sufficiency. Therefore, I conclude that a preponderance of the evidence supports the allegation that the termination of those 11 employees violated Section 8(a)(1) of the Act.

B. *Findings of Fact*

Aware that certain second-shift employees had satisfactorily resolved certain complaints about working conditions as a result of a meeting with Thompson, a group of third-shift employees clocked out at shift's conclusion on the morning of October 25 and obtained a similar meeting with Thompson. The testimony discloses collateral differences over some particular items discussed during that meeting. However, Thompson agreed that ''quite a few matters'' were brought to his attention during it, some pertaining only to particular individuals and others ''pertaining to a department or group'' as a whole.

In the context of this case the two significant subjects discussed during the employees' meeting with Thompson were Rotomold Department Foreman Victor Lopez and, second, Gabriel Sepulveda, who had been employed by Respondent for approximately 2 or 3 weeks at the time of the October 25 meeting. Assembler Blanco testified that he had complained to Thompson ''that I was having a lot of pressure from Victor Lopez,'' who ''used to push us. Telling us that, 'I want this job done by a certain time and if you cannot do it I will bring my child here.''' Foamer's helper Hernandez agreed that Blanco had complained about ''the bad treatment,'' as had assemblers Alida Nunez and Martin Gomez, among others. More specifically, Hernandez testified that ''some other co-workers, also made comments to Mr. Steve, also that someone was making fun of them, that someone was cheating them out of their seniority.'' With regard to the latter, Hernandez testified that ''they wanted to put someone as a lead person and that person had only been working there for about 15 days.'' His testimony in that respect was clarified further during cross-examination when he agreed that

[1] Unless stated otherwise, all dates occurred in 1990.
[2] The General Counsel's unopposed motion to correct transcript is granted.

''one of the things that we talk[ed too Thompson] about'' had been ''a man that had been picked for supervisory training by the name of Gabriel Sepulveda.''

Lopez, who did not attend this meeting, denied having ever engaged in the type of conduct attributed to him by the employees. Nevertheless, when testifying about the October 25 meeting, Thompson did not contest that there had been complaints about Lopez pressuring and deprecating employees. Nor did Thompson dispute that there had been complaints about Sepulveda's selection. In fact, Thompson agreed that ''we didn't have a discussion about how seniority worked, but there was a question on an item raised, you know, regarding seniority.''

However, there was disparity concerning what Thompson had promised at the end of the meeting. Hernandez testified that Thompson had said simply ''that he was going to investigate'' and needed time to do so. So also did assembler Luis Martin Gomez, who testified that Thompson had said, ''That he was going to try to find out a solution about this.'' However, Blanco testified that Thompson had ''told us to wait two or three days for him to give us an answer.'' Blanco's testimony in that respect was corroborated by packer Francisco Lemus who testified that Thompson had ''said that we were to wait for two or three days and he was going to look into—into the case.''

In the final analysis, Thompson never specifically denied having made a promise to respond within 2 or 3 days to the employees' complaints. Thus, a question concerning his response at the end of the meeting sparked the following exchange when Thompson testified:

> A. My response was that I had taken notes and that I was interested in their problems and that I would look into every problem.
>
> Q. Okay. Did you tell them that you would get back to them in two or three days?
>
> A. I don't recall that.
>
> Q. Well, there's a difference between not recalling and whether you think you did or you didn't; do you think you did or do you think you didn't?
>
> . . . .
>
> THE WITNESS: I recall saying that I was asked when I could get back to them and I said, ''I'll get back to you as soon as I can,'' but I want—I have to have time to investigate these items.

Therefore, Thompson never denied with particularity that he had promised to return to the employees with answers within 2 or 3 days after the October 25 meeting.

It is undisputed that Thompson did not report back to the third-shift employees within 2 or 3 days of the October 25 meeting. He testified generally that, following that meeting, he ''had begun the process'' of investigating their complaints. But, other than testifying that he had not been able to get answers to ''all of them,'' Thompson did not describe with specificity what steps he had taken in doing so. Nor did he advance even an estimate as to what further time he might have needed to conclude his investigation of ''all their complaints[.]'' Accordingly, on the night of Thursday, October 25, to Friday October 26, third-shift employees completed their work for the week during which they met with Thompson and then began the following workweek by completing their shift for Sunday, October 28, to Monday, October 29, and by beginning their shift for Monday, October 29, to Tuesday, October 30, without further word from Thompson.

During that intervening 5 days, Respondent's officials admittedly were put on notice of continued third-shift employee dissatisfaction. For example, after the third shift's work was completed at 7:30 a.m. on Monday, October 29, first-shift Rotomold Department Foreman Ray Garcia had been approached by Ramon Ventura. Ventura said that he desired to be transferred, because he wanted to continue working for Respondent and feared that he would lose his job because some other third-shift employees were pressuring him to join them in ''not clocking in and not going to work'' that night. Ventura's remarks were related by Garcia to Lopez. However, there is no evidence that Respondent took any precautionary action by accelerating Thompson's investigation of third-shift employees' complaints. Nor is there evidence that Thompson gave any consideration to again meet with third-shift employees to try to head off any possible work stoppage in which they might engage. But if Thompson held no meeting with the employees after October 25, other officials of Respondent did so.

As Lopez acknowledged, ''everybody clock[ed] in at the same time'' at the beginning of the third shift on Monday night, October 29. The employees performed their work without interruption and took their first break at 1:30 a.m. on, by then, October 30. Assembler Luis Martin Gomez testified that prior to that, break assembler Jose Juventino Pulido ''came to the working area and made a comment to us that [Victor Lopez and his immediate supervisor, Ron Meredith] put him [Pulido] as a leader. That they told him don't get the people excited, calm down.''

At 1:30 a.m., most of the employees scheduled for break divided into essentially two groups, one going to the dining room located by Lopez' office and the other to some benches located in the parking lot at the plant's entrance. Pulido joined the latter group. There, Hernandez testified, Pulido related that he had been asked into Meredith's office where Meredith, Lopez, and Second-Shift Supervisor Jose Redondo had been present. Then, reported Pulido to the employees at the outside benches according to Hernandez, ''they told me that if I continue getting the people rattled up they were going to do something against me. They told me to be careful and that there were going to be consequences after this.''

Pulido did not appear as a witness, apparently because he remained in Mexico, where he had gone 4 or 5 months before the hearing commenced. However, there is no dispute that he had been summoned to Meredith's office prior to the 1:30 a.m. break on October 30. Blanco testified that he had been present when Lopez had instructed Pulido to wait in his (Lopez') office and, after commencing his own work, had observed Pulido enter and later leave Meredith's office. More significantly, Lopez admitted that, after the employees had clocked in on October 29 and before the 1:30 a.m. break on October 30, there had been a meeting with Pulido in Meredith's office. As Hernandez testified that Pulido had reported, Lopez acknowledged that, in addition to himself, Meredith and Redondo had been present. According to Lopez, during this meeting Pulido was asked

> why he was—he was—not agree with the decision we take; we asked him if he wants to be a trainer at the

> same time with Gabriel Sepulveda or if he wants to take that position or what's the problem and—and not take Gabriel or not tell Gabriel to—this involved, you know, start training as a lead.

Lopez testified that Pulido had responded that he did not ''want the position,'' but that there had been problems between Sepulveda and himself when they had been neighbors in Mexico sometime in the past. At one point, testified Lopez, Pulido had said that he ''just want[ed] to keep Gabriel Sepulveda out as a lead man,'' but at another point Lopez testified that Pulido had ''said he doesn't care if Gabriel's going to take the position.'' Lopez also testified that Pulido had said that, other than Sepulveda's selection, he had no other problems.

Several aspects of the meeting with Pulido are noteworthy. Lopez never explained Respondent's motivation for suddenly convening it with a single third-shift employee that night. Nor did he explain the motivation that had led to selection of Pulido as the employee with whom that meeting was conducted. Similarly, in light of the concededly ''quite a few matters'' raised with Thompson on October 25 by third-shift employees, Lopez never explained why the subject of Sepulveda had been the lone topic of discussion during that meeting.

Neither Meredith nor Redondo was called as a witness, although there was no contention that they were unavailable to Respondent for that purpose. As a result, Lopez' account of the meeting with Pulido is left uncorroborated. Moreover, the record is devoid of an explanation for a second-shift supervisor's presence at a meeting with a third-shift employee. Nor did Lopez explain why it had been necessary for Meredith to preside over that meeting. Thompson never contended that Meredith had been a participant in the investigation set in motion by the third-shift employees' October 25 complaints. In fact, there is no showing that, in the ordinary course, Meredith normally had even remained at Respondent's facility until the third shift had commenced working.

The crucial point for this proceeding about the meeting with Pulido is that its occurrence provides plausibility for the employees' belief in the accuracy of Pulido's accounts to them of what had been said to him during it. In turn, that provided a basis for suspicion of Respondent's genuine willingness to address the complaints voiced to Thompson during the preceding week. In fact, the record does disclose that the employees became upset on hearing Pulido's description of that meeting. Hernandez and Blanco testified that the group at the outside benches discussed Pulido's report. According to Blanco, the group decided, ''That we were going to stop [work] because what Victor Lopez was saying [about Pulido's role in the employees' dissatisfaction] was a lie.'' That account was corroborated by Hernandez who also testified that there had been renewed complaints about continued pressure being put on employees, with the result that the group decided to stop work and seek a meeting with Respondent's owner in light of Thompson's by then seeming unwillingness to address their complaints.

As to the group taking their break in the dining room, Gomez testified that Pulido's report was discussed, along with the fact that Respondent's officials had falsely accused Pulido of causing discontent when, in fact, all of the employees were unhappy with Lopez' ''bad manners'' and unwillingness to listen to employees, as well as with a perceived lack of raises and adequate insurance coverage and with the selection of the relatively newly hired Sepulveda. However, unlike the outside group, Gomez testified that the one in the dining room had decided to try to talk to Lopez and, if he proved unwilling to listen, to then attempt another meeting with Thompson.

Apparently the dining room group's approach was adopted. For, Lopez testified that as the break concluded he was approached by Pulido who said the assemblers would like a meeting. Lopez agreed and went to the production area, saying, ''Okay. Let's see what the problems are and we're going to talk about it.'' However, testified Lopez, everybody began talking at once. He further testified that, during the group's initial response, he had heard Pulido, Rafael Ramirez, and Blanco, in particular, say ''they don't want Gabriel as a lead and say, why not take another employee that's the Korean name.''

Gomez and Blanco were the only two employees who testified with any specificity regarding what had been said at this particular meeting with Lopez. Both agreed that the employees had complained about Sepulveda. But they testified—and Lopez did not deny—that the specific complaint pertaining to Sepulveda had centered on his short employment with Respondent in relation to the tenure of other employees—in short, on his relatively low seniority. Nor did Lopez specifically deny the testimony of Gomez that the employees also had ''told [Lopez] about the bad insurance, . . . about the bad ventilation when we would be painting.''

Indeed, Lopez effectively conceded that more than one problem had been voiced by the employees at that particular time. Thus, he testified that when ''everyone start[ed] talking at the same time,'' he had concluded that ''we're not [going to] solve the problems, [and] I decided to talk to each person in my office, so I tell [them], 'Okay, we're going to solve the problems, we're going to talk to each employee in my office and we're going to take care of *all* the problems.''' (Emphasis added.) He directed the employees to return to work and they did so. Lopez then began meeting with individual employees.

He first called in Rafael Ramirez, who said he had no problems with Lopez nor with working with Sepulveda, but had joined the group so that there would be unity. Lopez' next meeting was with Alida Nunez. He testified that when he inquired about her problems, she had replied, ''I have no problems to work in the Assembly Department, but you know we don't want Gabriel Sepulveda.'' Responding to this remark, Lopez testified that he told Nunez, ''I select this guy to be training as a lead. This guy is not a lead, yet. He is training for the position, when we are ready to put him in that position, he's going to be a lead, but right now he is training only.'' According to Lopez, Nunez then said that she had no other problems.

Lopez testified that when he went to call the third employee for an individual meeting, he discovered that the employees had stopped working and were standing in the production area. According to Lopez, ''I went over to them and I say, Okay, please go back to work. I'm talking with each person and *all* problems are solving [sic]''' (emphasis added), but the employees replied, ''No, we're not going back to work until we speak to the plant manager or the owner of the company.'' Neither of those officials was

present at that time of the morning. So, testified Lopez, ''I told them again, 'Okay, please go back to work. The plant manager or the owner would show up early in the morning so at that time we can have a meeting with them and we can solve the problems if you want to talk to [them].''' (Emphasis added.) Hernandez, Gomez, and Lemus each testified that Lopez also told the employees that they should clock out if they did not intend to return to work. However, the employees repeated that they wanted to speak with the plant manager or the owner.

By way of explanation, Blanco testified that the employees' request to speak with the owner had been motivated by their perception that their earlier complaints had been ignored, especially in light of Thompson's failure to return with answers within the promised 2 or 3 days of the October 25 meeting. Because they ''felt that perhaps [Thompson] had communicated [their October 25] complaints'' to the owner and because ''we were having more pressure [from Sepulveda] and we could hardly take it anymore, so we stopped'' work and sought to protest directly to Respondent's owner.

In fact, it ultimately was not disputed that, during the initial exchange with Lopez after the work stoppage, some of the employees had expressly complained about Sepulveda's selection. For example, Blanco testified that, ''Some of the other persons such as the ladies said, 'Why, we know the work, we know the work we do in the areas and we've been here a lot longer?''' Yet, when initially asked if he had known why the employees had stopped working on October 30, Lopez claimed ''at that time I didn't know why they had stopped working'' and that he had not been concerned about the employees' reasons for doing so. Only when pressed further during cross-examination did he finally concede that,

> So when they stopped working and I went over to them, you know, I didn't ask them why they had stopped working for; but I have an idea that's the problem, because they don't want Gabriel as a lead. They didn't want—they say and they don't want to go back to work until they talk to the owner or the plant manager because they don't want Gabriel as a lead.

Moreover, in the end, Lopez did not dispute that the particular complaint about Sepulveda's selection had pertained to his lack of seniority relative to that of other employees.

It is undisputed that Lopez withdrew from the production area following this exchange; that the machinists and most of the foamers resumed working; that the assemblers tried unsuccessfully to persuade working employees to support them by stopping work and, then, joined other employees in the dining room at the 3:30 a.m. lunchbreak; and, that after that break some assemblers remained in the dining room and other stood around in the area immediately outside of the dining room. However, the evidence was not so straightforward concerning the actions of Respondent's officials following Lopez' departure from the production area after his exchange with the employees who had ceased working.

Lopez testified that, having unsuccessfully tried to persuade the employees to return to work, he had ''called Steve and Ron Meredith, my boss.'' According to Lopez, ''When I called Ron the first time, he told me to tell them go back to work and we're going to show up early in the morning so we can talk to them and, you know, tell them again, please go back to work.'' Yet, as pointed out above, Meredith was never called as a witness by Respondent and, accordingly, did not corroborate Lopez' account of that asserted conversation. Moreover, while Lopez described that conversation as having occurred ''[w]hen I called Ron the first time,'' he did not describe their conversation(s) during their subsequent telephone call or calls that morning. Furthermore, although Lopez claimed that following that ''first'' conversation with Meredith, he had ''started doing'' as Meredith had instructed, there is no evidence that Lopez returned to again speak with the employees until after the lunchbreak—over an hour after the work stoppage had begun. Not only did the employees place their second postwork stoppage exchange with Lopez as having occurred at that time, but Lopez admitted, in response to counsel's suggestion, that it had not been until ''about 4:10 that morning'' that he had returned to where the employees had gathered ''in the lunch room in the production area.'' At no point did Lopez explain his apparent failure to more promptly carry out Meredith's purported above-described instruction.

The confusion in Respondent's evidence is compounded by comparison of Lopez' testimony with that of Thompson concerning their telephonic communication during the early morning of October 30. Lopez first testified that, at ''about 4:10 that morning,'' he had told the employees to ''[g]o back to work,'' but that they had remained ''in the lunch room in the production area.'' He then testified, ''At that time and that's when I called Steve and I told them, please go back to work . . . and if you don't, please clock out and come back at 7:30 so we can have a meeting.'' As a result, it was not clear from Lopez' testimony whether he had telephoned Thompson immediately before or after his second postwork stoppage exchange with the employees. However, Lopez never described, nor even claimed, that he had participated in more than a single telephone conversation that morning with Thompson. That is, he never claimed that there had been a telephone conversation between them much earlier than the one that he placed as having occurred immediately before or after his second exchange with the employees who had stopped work.

Thompson also described a telephone conversation with Lopez that, testified Thompson, had occurred ''about 4:00, between 4:00 and 4:30.'' However, he claimed that that call had been the second one concerning the work stoppage that he had received from Lopez. Thompson further testified that the call ''between 4:00 and 4:30'' had occurred ''maybe another hour, an hour and a half'' after an earlier call from Lopez.

Not only was that testimony about an earlier call not corroborated by Lopez, but other aspects of Thompson's testimony about two telephone calls are puzzling. For example, he claimed that he had issued essentially identical instructions to Lopez in both of them. Thus, he testified that during the first asserted call, ''I told him . . . let [t]he people have a choice to work or not to work, that if they don't want to work, it's their choice and they can clock out and leave the premise[s].'' In the call between 4 and 4:30, Thompson testified that ''I asked [Lopez] to write this down that he should tell the employees . . . that they should return to work and if they don't want to return to work, then they should clock out and leave the premise[s].'' At no point did Thompson explain what he could have hoped to accomplish by twice in-

structing Lopez to follow an essentially identical course of action. Nor is such an explanation suggested by review of the other evidence. Moreover, at no point did Lopez testify that he had been twice instructed by Thompson to tell the employees to return to work or to clock out and leave the premises.

Furthermore, Thompson's testimony was internally inconsistent in its descriptions of his reaction to Lopez' report concerning the work stoppage. At one point, he testified that, having been told that the employees would not resume working until they spoke with him or the owner, ''I said, 'Okay, I'll get up and get ready and come in as soon as I can.''' But Lopez did not corroborate that testimony and Thompson later testified that, after having spoken with Lopez, he had been unable to get back to sleep. But that testimony contradicted his own account of an intention announced to Lopez to ''get ready and come in as soon as I can.'' Of course, it might be argued that Thompson was referring to the first asserted call when he claimed that he had tried to get back to sleep and, by contrast, that he had gotten ready to go to work after the second purported telephone conversation with Lopez. However, any such possible supplied explanation for this internal contradiction is completely eliminated by Thompson's further specific testimony that, after talking to Lopez, ''I couldn't go back to sleep so I decided to come in earlier.'' That is, he had come to Respondent's plant only after unsuccessfully trying to return to sleep. In the face of that testimony, there is no basis for an argument that Thompson's inability to return to sleep had occurred as a result of Lopez' asserted first telephone call and did not pertain to Thompson's reaction to the call ''between 4:00 and 4:30.''

With regard to the substance of the call or calls by Lopez, Thompson testified that during the asserted first one, there had been no discussion whatsoever concerning the employees' reasons for having stopped work:

> Q. And you didn't ask him why they had stopped work?
>
> A. No. Not that I recall at that time in the morning?

However, testified Thompson, in the purported second telephone conversation, Lopez ''did describe *some* of the problems they were having, that they were unhappy with the—the person that he had chosen for the lead.'' (Emphasis added.) Having thus abruptly shifted from multiple reasons for the work stoppage to a single one, in midsentence, Thompson subsequently adhered to the latter version, testifying that he only recalled Lopez telling him that the employees were concerned about Sepulveda's selection as lead and, further, that he did not ''recall asking'' whether ''the employees had voiced any other problems to [Lopez].''

Whether because of his promise to ''get ready and come in as soon as I can'' or because he ''couldn't get back to sleep so I decided to come in earlier,'' Thompson did make the 25-mile drive from his home to Respondent's plant. He testified that he had arrived about 5:15 or 6 a.m. and that ''I went into my office and asked Victor [Lopez] to tell me what was going on,'' to which Lopez replied that the employees still refused to return to work or to clock out and leave the premises. According to Thompson, during this meeting with Lopez, there had been no ''detailed discussion'' of Sepulveda nor apparently of any other motivation that the employees might have had for ceasing work earlier that day. Lopez did not corroborate Thompson's testimony regarding this meeting and the discussion that assertedly occurred during it.

After his arrival, Thompson did meet three times with the employees who had ceased working: in his office, shortly afterward in the lunchroom, and across the street from Respondent's plant after the employees had left it. During the office meeting, employee Jose Luis Garcia—who is not an alleged discriminatee—interpreted for the Spanish-speaking employees and the English-speaking Thompson. However, Garcia did not appear as a witness. Thompson described this meeting by testifying only that he had asked the assembled employees, ''What's going on? and they were all talking at the same time,'' and had ''continued to talk'' when he asked them to return to work. Undisputed was the testimony that Blanco had said to Thompson that the employees liked to work, but that he had not responded to their problems within 2 or 3 days as he had promised, to which Thompson replied that the employees should have given him more time because he was continuing his investigation. Nor is it disputed that Thompson ultimately told the group that he ''did not want to know anything else'' and that they were suspended. Some of the employees demanded that Thompson put the suspension in writing and they all left the office, going to the dining room.

Thompson wrote out separate suspension notices for each of the employees. Each notice recited that the employee was ''suspended for failure to follow instructions pending an investigation'' and directed that the personnel office should be called for further information between 3 and 4 o'clock that afternoon. Thompson took the notices to the dining room where he distributed them to the employees assembled there. Despite the notices' direction to call the personnel office, Thompson did not deny having orally told the employees to either call or return to Respondent's facility that afternoon. Initially, the now-suspended employees continued to refuse to leave the facility and Thompson called the police to remove them. However, before the police arrived, the employees decided to leave when one of their members appeared to become ill.

After leaving Respondent's plant, the employees went across the street from it. Thompson testified that, on noticing them there,

> I think that I—I wanted to know what their real problem was; that I—I think I wanted to ask them one more time, you know, what their particular problem was, because it didn't make sense to me that—that they were that upset that they had taken the action they had taken and made the choices that they made. And I just wanted to ask them, you know, one more time.

He told bilingual First-Shift Supervisor Garcia to accompany him across the street to talk to the employees.

There is no dispute that Garcia did cross the street and did speak with the employees that morning, although Blanco denied that Thompson had accompanied or later joined him. By contrast, Alida Nunez and Ofelia Romero each testified that she did not remember if Thompson had been with Garcia and Hernandez testified that, ''Thompson came to us, after that Mr. Ray Garcia came close to us . . . to come and inter-

pret.'' But the more significant dispute centered on the words exchanged during the meeting across the street from Respondent's plant.

Garcia testified that, interpreting for Thompson, he asked the employees why they had stopped work, to which three of them—Pulido, Blanco, and Gomez—replied that they did not want Sepulveda ''trained for a lead position'' and that they were willing to return to work if he was fired. Garcia's description of the employees' response was not uncontested. Blanco denied that the employees ever had demanded that Sepulveda be fired. Nunez testified that, from what she remembered, there was no mention by the employees of wanting someone fired. Romero testified that, in replying to Garcia that morning, she had complained that ''we were being pressured a great deal on the job, that a young man they have there working was bossing us and mistreating us.'' But she further testified that, ''I did not hear anyone say that anyone wanted someone fired.''

In the final analysis, any reliance that might have been placed on Garcia's recitation of a demand for Sepulveda's discharge was undermined completely by Thompson's own testimony regarding Garcia's translation of the employees' responses to his question of them. During direct examination, Thompson testified that Garcia had translated ''that their reason for not going back to work was because we had a—a chosen lead over other employees, and that the employees felt that we had cheated a seniority system.'' At that point, Thompson made no mention of any employee demand for Sepulveda's discharge. Nor did he do so during cross-examination when he testified, in response to a question concerning what Garcia had said about the employees' answer, ''that they—they didn't like this person being chosen for a lead and—well, that was it. They didn't like that person that Victor Lopez had chosen for the lead.'' Indeed, Thompson then answered affirmatively when next asked if that had been ''all Mr. Garcia told you[.]'' Ultimately, during redirect examination, Thompson testified that he had heard Garcia's testimony and that his recollection of what had occurred across the street conformed to Garcia's testimony. However, even at that stage, Thompson still did not specifically claim that any of the employees had demanded the termination of Sepulveda.

On conclusion of the meeting across the street with the suspended employees, Thompson returned to Respondent's plant. At approximately 3 p.m. that day, those employees returned there. In individual meetings with Thompson, each one was handed a personnel action notice which recited that he/she was being terminated for insubordination because of, ''Refusal to return to work or leave company property.'' Aside from these legends on those notices, the only other evidence—and the only evidence provided under oath—pertaining to Respondent's motivation for these terminations was the testimony of Thompson. However, in light of the wellsettled principles that, in evaluating the legality of discharge motivation, ''the pivotal factor is motive'' (citation omitted); *NLRB v. Lipman Bros*., 355 F.2d 15, 20 (1st Cir. 1966), and ''the employer's motive becomes the focal point''; *NLRB v. Oberle-Jordre Co*., 777 F.2d 1119, 1121 (6th Cir. 1985), careful examination of that testimony reveals certain objective aspects that tend to undermine reliance on it.

Despite the above-quoted statements on the personnel action notices, under oath Thompson never did explain the specific reason(s) for Respondent's decision to fire the 11 alleged discriminatees. Twice he testified about circumstances under which those employees would not have been discharged:

> Q. If the employees had clocked out that night, after they refused to work, if they wanted to strike or engage in a work stoppage, and they had left the property and came back at 7:30 in the morning, were you going to fire them?
>
> A. No. We would have had a meeting.
>
> . . . .
>
> Q. (By Mr. Ristau): Steve, if the employees had gone back to work would you have fired them?
>
> A. No.
>
> Q. If the employees had left the plant after they stopped work and were waiting a meeting for you, would you have fired them?
>
> A. No.
>
> Q. If it had been communicated to you anywhere along the course of the evening that the employees were stopping work because of an unsafe condition, would you have fired them?
>
> A. No. Of course not.

But, affirmatively, at no point did Thompson testify concerning the actual reason or reasons for Respondent's termination decision.

It is settled that ''mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds.'' (Citation omitted.) *NLRB v. Symons Mfg. Co*., 328 F.2d 835, 837 (7th Cir. 1964). Accord: *Singer Co. v. NLRB*, 429 F.2d 172, 179 (8th Cir. 1980). For, the ultimate ''determination which the Board must make is one of fact—what was the actual motive of the discharge?'' *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969). Thompson never did explain that motive.

Furthermore, although Thompson acknowledged that he had been a participant in the decision to terminate the 11 employees, he refrained specifically from claiming that he had been the only official of Respondent involved in having made that decision:

> Q. Okay. And did you make the decision to terminate these people?
>
> A. No, not completely.
>
> Q. Was anyone else in management or ownership of the company participatory in this decision to terminate these employees?
>
> A. When a problem or a situation arises of this importance, you know, concerning the employees, you know, it's customary where several people, several members of the management would come together and discuss the problem and try to arrive at the right solution.
>
> Q. So the answer is yes to that question?
>
> A. Yes.

However, Thompson never identified the other official(s) who had participated in the discharge decision. Moreover, no

other official of Respondent appeared as a witness to explain the actual motive for it. Yet, their ''motivation was critical on the question of Respondent's reason for [that decision, and] its failure to call [them] permits an adverse inference as to its motivation.'' (Citations omitted.) *American Petrofina Co*., 247 NLRB 183, 192 (1980).

In fact, Thompson vacillated when asked even so basic a question as when the termination decision had been made during the day on October 30: ''to pin it down, when we had actually made the decision, I think is—is on the difficult side because you would have members of the group expressing their feelings.'' Indeed, the effort to more precisely focus this particular aspect of the termination decision was met with only additional equivocation by Thompson: ''I think that I came away from that meeting with the understanding that there was going to be a termination.''

C. *Analysis*

Ultimate disposition of the issues presented by this case is governed by essentially straightforward principles. ''A violation of § 8(a)(1) is established if (1) the employee's activity was concerted; (2) the employer was aware of its concerted nature; (3) the activity was 'protected' by the [A]ct; and (4) the discharge or other adverse personnel action was motivated by the protected activity.'' (Citation omitted.) *NLRB v. Oakes Machine Corp*., 897 F.2d 84, 88 (2d Cir. 1990). On the facts of this case there can be no dispute that the first two elements are satisfied. After the first break during the morning of October 30, 11 employees ceased working and sought collectively to protest certain working conditions to Plant Manager Thompson or to Respondent's owner. Lopez knew that the 11 employees were acting in concert and it is admitted that he communicated that fact to Thompson. Accordingly, there is ample evidence of activity by employees that was concerted and, further, that Respondent had knowledge of its concerted nature.

As to whether the employees' work stoppage was protected, ''[a] concerted work stoppage and walkout by unrepresented employees for their mutual aid and protection is protected by § 7 of the Act.'' (Citations omitted.) *United Merchants & Mfrs. v. NLRB*, 554 F.2d 1276, 1278 (4th Cir. 1977). However, this fundamental protection for such activity is not without limitation and Respondent rests its principal arguments on two such limitations. First, it argues that the dischargees had only a single objective for their work stoppage and that object had been to protest the selection of an individual—Gabriel Sepulveda—as a supervisor. Since, continues the argument, the protection of Section 7 does not ordinarily encompass protests concerning the selection of supervisory personnel, the dischargees' work stoppage was not protected activity. Second, argues Respondent, the employees remained in its plant after the work stoppage, rather than walking out and, therefore, whatever protection Section 7 extended to their activity was lost as a consequence of their unwillingness to return to work or to clock out and leave the premises when directed to do so. But, in the circumstances of this case, there is no merit to either argument.

As to Respondent's first argument, ''Traditionally, the interest of the employer in selecting its own management team has been recognized and insulated from protected activity.'' *Abilities & Goodwill v. NLRB*, 612 F.2d 6, 8 (1st Cir. 1979). Consequently, where ''employee concerted activity is designed solely to effect or influence changes in the management hierarchy[,] . . . the Board has found that such conduct does not constitute protected activity.'' (Citation omitted.) *Hoytuck Corp*., 285 NLRB 904 fn. 3 (1987). However, while it cannot be disputed that the dischargees were opposed to Sepulveda's selection, their work stoppage was not deprived of statutory protection because of that opposition. This is so for essentially three reasons.

First, although, in questioning, counsel characterized the position for which Sepulveda had been training as a supervisory one, no evidence was adduced to show that Sepulveda possessed or, once trained, would possess any one of the supervisory powers enumerated in Section 2(11) of the Act. It is settled that the party who contends that a particular position is supervisory bears the burden of establishing as much: bears the burden of adducing evidence that independent judgment is exercised by its occupant with respect to at least one of the powers listed in Section 2(11) of the Act. See, e.g., *Hydro Conduit Corp*., 254 NLRB 433, 437 (1981). Moreover, as illustrated by portions of their testimony quoted in subsection II,B, supra, whenever not led by characterization of Sepulveda's then-present and projected position, both Lopez and Thompson referred to that position as a ''lead'' one—the type of position ordinarily categorized as being nonsupervisory. See, e.g., *Brewery Workers v. NLRB*, 298 F.2d 297, 303 (D.C. Cir. 1961), cert. denied 369 U.S. 843. Accordingly, the evidence does not support the contention that Sepulveda did or would occupy a position that could be characterized as supervisory within the meaning of Section 2(11) of the Act. It follows that protests about his selection did not constitute an effort ''to effect or influence changes in the management hierarchy'' of Respondent. *Hoytuck Corp*., supra.

Second, to the extent that Sepulveda's selection had been an item of protest, there is no basis for concluding that the employees had not been protesting ''in fact . . . the actual conditions of their own employment.'' *Puerto Rico Food Products Corp. v. NLRB*, 619 F.2d 153, 156 (1st Cir. 1980). Although there is a basis for concluding that Pulido did not like Sepulveda, based on past experience when both resided in Mexico, there is no basis for concluding that Pulido or any of the other 10 dischargees had stopped and refused to return to work on October 30 simply because of personal animosity between those two men. Cf. *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949). Rather, as described in subsection II,B, supra, there was credible testimony that employees were dissatisfied that Respondent had bypassed more senior employees in selecting the newly hired Sepulveda for ''lead'' training and, further, that they and their work were being subjected to perceived abusive and unfair criticism and treatment by the relatively inexperienced Sepulveda.

Both of those concerns—seniority and treatment—pertain to conditions of employment even where an actual statutory supervisor is the immediate object of concerted activity. For example, concerted activity has been held protected by Section 7 of the Act where protests about supervisors have focused on ''employee complaints about their supervisors' treatment of them,'' *Calvin D. Johnson Nursing Home*, 261 NLRB 289 fn. 2 (1982), and on employee resentment that a relatively inexperienced supervisor ''did not understand the work and that one of their number should have been ad-

vanced to the position of [supervisor].'' *NLRB v. Guernsey-Muskingum Electric Cooperative*, 285 F.2d 8, 12 (6th Cir. 1960).

Third, the evidence shows that there were more reasons for the work stoppage than simply selection of Sepulveda for lead training. As might be expected whenever unorganized employees have ''to speak for themselves as best they could,'' *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 14 (1961), different employees singled out different conditions that precipated their work stoppage: Sepulveda's lack of seniority and perceived mistreatment of them, reports of what had been said to Pulido during Meredith and Lopez' meeting with him before the first break on the October 29–30 third shift, Thompson's perceived broken promise to report back to the employees 2 or 3 days after his meeting with them on October 25, the various items complained about to Thompson at that meeting. Thus, despite isolated expressions to Lopez and Thompson during the morning of October 30, in fact there had been more than a single reason for the employees' work stoppage.

Indeed, Respondent's officials admitted that they understood that there had been multiple reasons for the dissatisfaction that led to the work stoppage. As quoted in subsection II,B, supra, Lopez testified that, when he had first met with the employees after their break and before the work stoppage had begun, he had told them that he would try to resolve ''all'' of their ''problems.'' Similarly, Thompson testified—at least before abruptly reversing field—that Lopez had described ''some'' of the employees' ''problems'' during a postwork stoppage telephone conversation that morning.

In sum, there is no basis for concluding that the work stoppage had been motivated solely by supervisory selection and that, by their work stoppage, the employees were attempting, even in part, to interfere with Respondent's selection of its management team. To the contrary, the third-shift employees believed that they faced myriad problems which they felt should be addressed by Respondent. Therefore, a preponderance of the evidence shows that the work stoppage was protected by Section 7 of the Act.

Respondent's second principal argument is that, by their postwork stoppage remainder in its plant, the dischargees lost the Act's protection. In so arguing, Respondent relies on cases whose holdings are rooted in the doctrine enunciated in *NLRB v. Fansteel Metallurgical Corp*., 306 U.S. 240, 253 (1939). Essentially, that case stands for the proposition that ''employees [have] the right to strike but they [have] no license to commit acts of violence or to seize their employer's plant'' in the course of doing so. Relying on that holding, Respondent argues that the 11 dischargees' refusal to leave its facility, in response to Lopez' order to do so if they did not return to work, deprived their work stoppage of continued protection under Section 7 of the Act.

At first blush, it might appear that the outcome in this case is governed by the Board's decision in *Waco, Inc*., 273 NLRB 746 (1984). In that case, the Board concluded that the allegedly unlawful discharged employees—who had refused to begin work and, failing either to state specific demands or to facilitate possible resolution of their concerns by meeting with the fabrication department manager on other than a group basis, had remained in the employer's lunch room for at least 3-1/2 hours, giving no indication of a willingness to either return to work or leave the premises—''had overstepped the boundary of a protected, spontaneous work stoppage, and were occupying the facility in a manner which was unprotected.''

Nevertheless, the Board pointed out in that very case that ''the precise contours within which such activity is protected cannot be defined by hard-and-fast rules. Instead, each case requires that many relevant factors be weighed.'' Id. For, ''not every strike in which strikers remain on the premises amounts to an unlawful deprivation of an employer's right.'' *Roseville Dodge v. NLRB*, 882 F.2d 1355, 1358 (8th Cir. 1989). Indeed, employees are ''entitled to have their protest heard and to hear the reaction of management.'' *GF Business Equipment v. NLRB*, 529 F.2d 201, 204 (8th Cir. 1975). ''An employer cannot convert a protected in-plant work stoppage into an unprotected trespass by the simple expedient of ordering his employees from the plant where . . . such an order serves no immediate employer interest and unduly restricts the employees' right to present grievances to their employer.'' *NLRB v. Pepsi-Cola Bottling Co. of Miami*, 449 F.2d 827, 829 (5th Cir. 1971).

A review of the cases since *Fansteel*, where employees have remained in their employers' facilities after stopping work, discloses that both the Board and the circuit courts have struggled to identify criteria for applying that case's doctrine. Some decisions have concluded that the employees' continued presence deprived their activity of the Act's protection: *Waco, Inc*., supra; *NLRB v. Condenser Corp. of America*, 128 F.2d 67, 77 (3d Cir. 1942); *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 450–454 (4th Cir. 1969); *Advance Industries v. NLRB*, 540 F.2d 878, 883–885 (7th Cir. 1976). Others have reached the contrary conclusion: *Roseville Dodge v. NLRB*, supra; *GF Business Equipment v. NLRB*, supra; *NLRB v. Pepsi-Cola Bottling*, supra; *Cudahy Packing Co*., 29 NLRB 837, 867–868 (1941), affd. sub nom. *Omaha Cudahy Plant Workers Union v. NLRB*, 123 F.2d 63 (8th Cir. 1941); *NLRB v. American Mfg. Co*., 106 F.2d 61, 67–68 (2d Cir. 1939), modified and affd. per curiam 309 U.S. 629; *Olin Industries v. NLRB*, 191 F.2d 613, 615–616 (5th Cir. 1951), cert. denied 343 U.S. 919; *NLRB v. J. I. Case Co*., 198 F.2d 919, 921–922 (8th Cir. 1952), cert. denied 345 U.S. 917; *Golay & Co. v. NLRB*, 371 F.2d 259, 261–263 (4th Cir. 1966), cert. denied 387 U.S. 944; *United Merchants & Mfrs. v. NLRB*, supra.

In the process of attempting to accommodate employees' statutory right to present complaints about working conditions to their employers and employers' rights to possession and protection of their property, these cases have examined whether the employees have remained on the employer's premises for a relatively short or definable period of time—such as ''during the time that discussions with the employer were being carried on,'' *United Merchants & Mfrs. v. NLRB*, supra, 554 F.2d at 1279, or until their shift had ended, *NLRB v. Pepsi-Cola Bottling*, supra, 449 F.2d at 829—or, instead, have attempted to remain for a relatively prolonged or indefinite period, such as ''refus[ing] to leave after the end of their shift,'' *Advance Industries v. NLRB*, supra, 540 F.2d at 884, or indicating ''no plan to give up their occupation of Respondent's lunch room.'' *Waco, Inc*., supra, 273 NLRB at 747; see also *Cone Mills Corp. v. NLRB*, supra, 413 F.2d at 454. There also has been consideration of whether the employees have presented specific complaints, *Masonic & Eastern Star Home*, 206 NLRB 789 (1973), enfd. 514 F.2d 894

(D.C. Cir. 1975), or whether, instead, the employees failed to ''communicate to the [employer] the particulars of their grievance so as to facilitate a discussion or possible resolution of their concerns.'' *Waco, Inc*., supra. See also *Advance Industries v. NLRB*, supra, 540 F.2d at 884.

Another factor considered in this area has been whether the employees ''were not permitted to present or discuss their grievances with the plant representatives,'' *Olin Industries v. NLRB*, supra, 191 F.2d at 615, see also *NLRB v. American Mfg. Co*., supra, 106 F.2d at 67; *GF Business Equipment v. NLRB*, supra, 529 F.2d at 204, and no other means existed for addressing the employees' complaints, *United Merchants & Mfg. v. NLRB*, supra, 554 F.2d at 1279, or, instead, alternative means to continued presence on the premises existed for peacefully resolving the dispute, such as a grievance procedure, *Advance Industries v. NLRB*, supra, 540 F.2d 885, or an expressed willingness to meet with the employees to discuss their complaints. *NLRB v. Condenser Corp*., supra, 128 F.2d at 77; see also *Waco, Inc*., supra. Other factors addressed in some of these decisions have been whether or not the dispute resulted from the employer's unfair labor practices, *NLRB v. American Mfg. Co*., supra, 106 F.2d at 68, and whether or not the employees acted ''in reckless disregard of the employer's rights,'' *United Merchants & Mfrs. v. NLRB*, supra, 554 F.2d at 1279, by ''claiming to hold the premises in defiance of the right of possession of the owner,'' *NLRB v. American Mfg. Co*., supra, 106 F.2d at 67; see also *NLRB v. Clinchfield Coal Corp*., 145 F.2d 66, 72 (4th Cir. 1944); interfering ''with the work performance of non-strikers,'' *NLRB v. Pepsi-Cola Bottling*, supra, 449 F.2d at 829; see also *Roseville Dodge v. NLRB*, supra, 882 F.2d at 1359; or threatening or engaging in acts of violence and damage to property, id.; see also *United Merchants & Mfrs. v. NLRB*, supra, 554 F.2d at 1279, as opposed to ''interfer[ring] with production no more than a simple cessation of work by these employees would have.'' *Golay & Co. v. NLRB*, supra, 371 F.2d at 262.

In contending that the dischargees were deprived of Section 7 protection by their continued presence in its plant after stopping work, Respondent contends that they disregarded a specific instruction to clock out and leave the premises if they did not return to work, they remained in the facility for over 4 hours, Respondent had an established grievance procedure which the dischargees knew had been successfully utilized by second-shift employees, and Lopez had assured them that they would be able to meet with Thompson when he arrived in the morning. Yet, in the context of the events described in subsection II,B, supra, these considerations are not as persuasive as portrayed by Respondent's contentions.

As pointed out above, absent evidence of an employer interest that justifies restricting the dischargees' right to present their grievances, Respondent was not free to ''convert a protected in-plant work stoppage into an unprotected trespass by the simple expedient of ordering [its] employees from the plant.'' *NLRB v. Pepsi-Cola Bottling*, supra, 449 F.2d at 829. There is no evidence, and Respondent does not claim, that the 11 dischargees, or any one of them, ever ''claim[ed] to hold the premises in defiance of [Respondent's] right of possession.'' *NLRB v. American Mfg. Co*., supra, 106 F.2d at 67. That is, they appealed to coworkers for support, but there is no evidence of interference with the work of those who did not join them.

After the lunchbreak, they remained in the dining room and area immediately outside of it. However, Respondent presented no evidence that the presence of so relatively few employees barred other employees' access to the dining room. Moreover, although the area outside of the dining room is utilized for storage and access, Respondent did not present any evidence that the dischargees' presence there prevented access through, or performance of work in, that particular area. Nor did Respondent claim or present any evidence of threats or acts of violence or of property damage by any of the dischargees. In sum, while production was diminished to the extent that they did not perform their own work, there is no evidence that production that morning suffered to any greater extent—''no more than a simple cessation of work by these employees would have.'' *Golay & Co. v. NLRB*, supra, 371 F.2d at 262.

Nor is Respondent's argument necessarily enhanced by the 4 nonworking hours spent in its facility by the dischargees on October 30. Although an obviously valid consideration, there is no universal agreement on the exact number of hours and minutes that must elapse for continued presence to be regarded as excessive and unprotected. For example, the Board, at least impliedly, deemed 3-1/2 hours to be excessive in *Waco, Inc*., supra. However, the Eighth Circuit Court of Appeals later characterized a 2- to 3-hour period of continued presence as a ''limited period of time.'' *Roseville Dodge v. NLRB*, supra, 882 F.2d at 1359.

Of course, one might argue that those cases should be synthesized so that periods of up to 3 hours of continued presence remain protected, while employees are deprived of protection for remaining in their employer's facilities for any longer period. But, such an approach is overly mechanistic. In some instances, a continued presence of even 5 minutes may overly infringe on an ''immediate employer interest,'' *NLRB v. Pepsi-Cola Bottling*, supra. By contrast, in other instances—such as ones where employees cease work and, while waiting ''to have their protest heard and to hear the reaction of management,'' *GF Business Equipment v. NLRB*, supra, retire to an isolated and unused location on their employer's premises—a relatively prolonged continued presence might remain protected. In short, this is not a factor susceptible of simple determination by a stopwatch.

The significant consideration here about postwork stoppage duration of the dischargees' continued presence in Respondent's facility is that at no point—prior to their suspension—did they state, or even indicate, that they planned not ''to give up their occupation of Respondent's [dining room and adjacent area].'' *Waco, Inc*., supra. In fact, at no point did they state or indicate even an intention to remain for a relatively prolonged or indefinite period of time. Rather, as Lopez acknowledged, the dischargees stated that they intended to remain until they could secure a meeting with Thompson or the owner. There is no evidence that gives rise to even an inference that they likely would have remained any longer, once such a meeting was conducted. As a consequences, so far as the evidence shows, at all times Respondent retained the ability to control the duration of the employees' continued nonworking presence through Thompson or the owner's participation in such a meeting—by allowing the dischargees ''to have their protest heard and to hear the reaction of management.'' *GF Business Equipment v. NLRB*, supra.

Of course, as Respondent points out, that approach would have required Thompson or the owner to come to its facility in the middle of the night. Yet, in the circumstances, that is not so unreasonable as it might appear at first blush. Because Respondent operates round the clock 5 days a week, it can fairly anticipate that there will be occasions when intermediate and even ultimate supervision might have to respond to emergencies and lesser abnormal occurrences at times other than those during which such supervision ordinarily works. Respondent does not suggest that there have not been occasions when Thompson or the owner have come to the facility at hours when they do not customarily work. Nor does it suggest that one or the other would not do so if necessitated by such events as major equipment malfunction or customer demand.

Indeed, Respondent's point is based on a somewhat one-sided approach to the free time of third-shift employees, on the one hand, and that of Thompson and the owner, on the other. For, on its face, it obliges third-shift employees to sacrifice their free time, when they have gotten off work on conclusion of their shift, so that Thompson and the owner can enjoy their own free time without interruption. So cavalier an allocation of burden between employee and employer is not necessarily one required of employees to secure the Act's protection.

Totally aside from the foregoing considerations, however, Respondent's argument, concerning the unreasonableness of demanding that Thompson or the owner appear in the middle of the night, loses all sympathy when viewed in conjunction with its argument pertaining to its grievance procedure. Page 14 of Respondent's personnel handbook sets forth an open-door policy that, inter alia, allows employees to bring problems to their immediate supervisor. In addition, that policy provides:

> If an employee believes the immediate supervisor is the source of the problem and he/she feels uncomfortable about approaching the supervisor, the employee may request a meeting with the supervisor who is the next higher authority in the chain command.

In fact, third-shift employees had followed that policy. On October 25 they presented ''quite a few'' complaints to Thompson. Credible testimony establishes—and, in the end, Thompson never denied—that he had promised to report back to those employees within 2 or 3 days. However, Thompson did not keep that promise. By the morning of October 30 the third-shift employees still had not heard the reaction of Thompson to their protest. Consequently, from the employees' perspective, Respondent appeared to be failing to comply with its own grievance procedure.

Of course, due to the weekend, 2 of the intervening days had been nonworking ones. Nevertheless, it was Thompson who had made the undisputed promise. The employees were entitled to take him at his word: that 2 or 3 days meant simply that, and not days calculated by excluding weekend days. If Thompson had actually intended to exclude such days from his promise, he should—and could—have simply said so to the employees.

In that connection, Respondent attempts to shift to the dischargees the burden of Thompson's failure to respond within 2 or 3 days. For, it asserts that if one or more of those employees had asked Thompson, he would have disclosed that it was taking longer to investigate the myriad complaints, but that he would report to them when finished. But by his promise, Thompson accepted responsibility for initiating further communication between himself and the third-shift employees. Yet, there is no evidence that he had done so at any time from the morning of October 25, when he met with the third-shift employees, to that of October 30, when the work stoppage occurred. Hence, for Respondent's contention to the plausible, one or more of the third-shift employees would have been obliged to wait after their shift had ended for Thompson's arrival for work, thereby again sacrificing their nonwork time—as they had done on October 25 when they initially met with Thompson at the end of their shift to voice their complaints—so that they could inquire, in effect, if Thompson was a person of his word and intended ever to keep the substance of his already broken promise as to time of reply.

Not only were the third-shift employees confronted by Thompson's failure to keep his promise, and by the absence of any indication that he ever intended to do so, but an additional troublesome event occurred that morning when Thompson's subordinate supervisors abruptly involved themselves in one of the complaints that had been addressed to Thompson. As pointed out in subsection II,B, supra, Lopez—the only supervisor at the meeting with Pulido who testified in this proceeding—never explained the objective for suddenly conducting such a meeting with a single employee. Nor did he explain why Pulido had been selected to be that employee. In conjunction with Thompson's unkept promise, it is hardly surprising that the occurrence of that meeting with Pulido would heighten third-shift employee suspicion about Respondent's willingness to seriously address their complaints.

In light of Thompson's nonresponse within the promised 2 to 3 days of October 25, three added factors naturally reinforced employee suspicion that resort to Respondent's open-door policy had been meaningless and, further, negated the asserted unreasonableness of an early morning meeting with Thompson or Respondent's owner. First, it is not disputed that one of the October 25 complaints had centered on the employees' perceived mistreatment by their supervisor, Lopez. Yet, after the shift began on October 29, it had been that very supervisor who inexplicably began dealing with one of the very subjects—Sepulveda's selection for training—about which the employees had complained to Thompson. Second, from third-shift employees' perspective, Thompson's unexplained nonappearance during their shift contrasted sharply with that of Meredith and Second-Shift Supervisor Redondo, who appeared on October 29–30 to participate in the meeting with Pulido. Finally, Thompson's apparent nonresponse to third-shift employee complaints also contrasted sharply with his reaction to earlier complaints by second-shift employees. His response to the latter, but not to the former, left a natural impression that he might not intend to dignify the complaints of the third-shift employees.

In sum, whatever conclusion might be reached by applying the foregoing analytical factors in other contexts, a preponderance of the evidence in this case does not establish that, by their conduct during the early morning of October 30, the 11 dischargees ''seize[d] their employer's plant,'' *NLRB v. Fansteel Metallurgical Corp*., supra, and, hence, were de-

prived of the Act's protection. Furthermore, even were it to be concluded that their continued presence somehow lost the Act's protection at some point that morning, there is no credible evidence that ''the actual reason for the discharges [was] the fact that they stayed too long in [the dining room and adjoining area].'' *Molon Motor Corp*., 302 NLRB 138 (1991).

The lone witness who testified concerning Respondent's discharge motivation was Thompson. However, in testifying, he was not a persuasive witness and a review of the record of his mostly uncorroborated testimony, particularly that potion pertaining to the discharge motivation, serves only to confirm the unfavorable impression left by the time that he had completed his testimony. Thus, he avoid identification of the point at which the discharge decision had been made. He conceded that the decision had been a joint one—one made by himself and one or more other officials. But he did not identify who else had participated in making that decision and no other witness appeared to explain Respondent's motivation. Indeed, while Thompson freely testified as to circumstances under which the dischargees would not have been terminated, he never did affirmatively testify as to the actual reason or reasons that led Respondent to make that decision.

In evaluating motivation, the fact that good reason for termination may have existed is not the determinative consideration. For, ''the policy and protection provided by the . . . Act does not allow the employer to substitute 'good' reasons for 'real' reasons.'' *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969), cert. denied 397 U.S. 935. Here, the General Counsel established that 11 employees were terminated for engaging in a concerted protest about working conditions. Respondent failed to establish that their activity lost the Act's protection and, even if it did, failed to meet its burden of going forward with credible evidence that the termination decision had been based solely upon ''the fact that [the dischargees] stayed too long in [Respondent's facility].'' *Molon Motor Corp*., supra. Therefore, a preponderance of the credible evidence establishes that the discharges were unlawfully motivated and violated Section 8(a)(1) of the Act.

CONCLUSION OF LAW

Cambro Manufacturing Company committed unfair labor practices affecting commerce by terminating eleven employees on October 30, 1990, for engaging in activity protected by Section 7 of the National Labor Relations Act.

REMEDY

Having found that Cambro Manufacturing Company engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to offer to Reyes Venegas, Rogelio Rodriguez, Luis Martin Gomez, Jose Juventino Pulido, Ofelia Romero, Alida Nunez, Francisco Lemus, Rafael Ramirez, Ramon Ventura, Hugh Torres Blanco, and Bernardo Hernandez Gonzalez immediate and full reinstatement to the positions from which they were terminated on October 30, 1990, dismissing, if necessary, anyone who may have been hired or assigned to perform the work from which they were terminated. If the position of one or more of those 11 employees no longer exists, it shall be ordered to reinstate those particular employees to a substantially equivalent position, without prejudice to his/her seniority or other rights and privileges. It also shall be ordered to make each one whole for any loss of pay he/she may have suffered because of the unlawful terminations with backpay to be computed on a quarterly basis, making deduction for interim earnings, *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest to be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]